IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan.	:	Case No. 2018-1396 On Appeal from the Public Utilities Commission of Ohio, Case Nos.:
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	:	16-1852-EL-SSO and 16-1853-EL-AAM

MERIT BRIEF OF APPELLEE OHIO POWER COMPANY

Steven T. Nourse (0046705)
(Counsel of Record)
Christen M. Blend (0086881)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
cmblend@aep.com

Kathleen M. Trafford (0021753)
(Initial appearance)
L. Bradfield Hughes (0070997)
(Initial appearance)
Eric B. Gallon (0071465)
(Initial appearance)
Porter Wright Morris & Arthur, LLP
41 South High Street, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 227-1915
Facsimile: (614) 227-2100
ktrafford@porterwright.com
bhughes@porterwright.com
egallon@porterwright.com

Attorneys for Appellee
Ohio Power Company

Dave Yost (0056290)
Ohio Attorney General

John H. Jones (0051913)
Assistant Section Chief

Werner L. Margard III (0024858)
(Counsel of Record)
Robert A. Eubanks (0073386)
Assistant Attorneys General

Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
john.jones@ohioattorneygeneral.gov
werner.margard@ohioattorneygeneral.gov
robert.eubanks@ohioattorneygeneral.gov

Attorneys for Appellee
Public Utilities Commission of Ohio

Bruce Weston (0016973)
Ohio Consumers' Counsel

William J. Michael (0070921)
Terry L. Etter (0067445)
(Counsel of Record)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
l0 West Broad Street, Suite 1800
Columbus, Ohio 43215
Telephone: (614) 466-1291
Facsimile: (614) 466-9475
william.michael@occ.ohio.gov

Attorneys for Appellant
The Office of the Ohio Consumers' Counsel

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INTRODUCTION

This appeal presents the Court with procedurally and substantively baseless challenges to the fourth Electric Security Plan ("ESP IV") for intervening Appellee Ohio Power Company ("AEP Ohio"). The Public Utilities Commission of Ohio ("Commission") properly approved the ESP IV based upon its review of a stipulation joined by a broad coalition of more than a dozen interested parties in the Summer of 2017, including trade groups representing large commercial and industrial customers, manufacturers, hospitals, and numerous environmental groups. The Commission's review of the stipulation exhaustively considered the traditional three-part test applied to evaluate the reasonable of a stipulation and found, based on the evidence presented, that 1) the stipulation was the product of serious bargaining among capable, knowledgeable parties, 2) as a package benefitted ratepayers and the public interest, and 3) did not violate any important regulatory principle or practice. *In re Ohio Power Co.*, Case Nos. 16-1852-EL-SSO & 16-1853-EL-AAM, Opinion and Order, ¶ 127-131, 132-204, 205-254 (April 25, 2018) ("*ESP IV Opinion and Order*") (OCC Appx. 000008.) The Commission separately applied the statutory test for approving an ESP and found that the ESP as proposed in the stipulation and modified by the Commission was more favorable in the aggregate than would be expected under a market rate offer. *Id.* at ¶ 255-269.

The Ohio Consumers Counsel ("OCC") – the *only* party challenging the ESP IV in an appeal to this Court – asserts three Propositions of Law in its merit brief. The first Proposition of Law makes a federal preemption argument that this Court lacks jurisdiction to review because OCC failed to include the argument in its Application for Rehearing below. Moreover, the preemption argument would fail on the merits due to settled precedent from the United States Supreme Court and elsewhere concerning states' authority to regulate *retail* – as opposed to

wholesale – rates of the kind the Commission approved here. OCC's second and third Propositions of Law lodge equally baseless challenges to the Smart City and Renewable Generation riders the Commission approved pursuant to the ESP statute, R.C. 4928.143(B)(2). For the reasons explained below and in the Commission's merit brief, this Court should decline to adopt OCC's Propositions of Law and should instead affirm the Commission's approval of the ESP IV.

STATEMENT OF THE CASE

R.C. 4928.141 provides that electric distribution utilities such as AEP Ohio shall provide consumers within their certified territories a standard service offer ("SSO") of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation resources. The SSO may be either a market rate offer ("MRO") in accordance with R.C. 4928.142, or an electric security plan ("ESP") in accordance with R.C. 4928.143.

In early 2015, in its *ESP III* Opinion and Order, the Commission modified and approved AEP Ohio's application for an ESP for the period between June 1, 2015 and May 31, 2018. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO *et al.*, Opinion and Order (Feb. 25, 2015), Second Entry on Rehearing (May 28, 2015), Fourth Entry on Rehearing (Nov. 3, 2016), Seventh Entry on Rehearing (Apr. 5, 2017) ("*ESP III Order*"). Among other things, in the *ESP III Order* the Commission authorized AEP Ohio to establish a zero placeholder Power Purchase Agreement Rider ("PPA Rider") and required AEP Ohio to justify any future request for cost recovery in a separate proceeding. In early 2016, in the *PPA Rider Case*, the Commission modified and approved a stipulation and recommendation pertaining to AEP Ohio's proposal to populate the zero placeholder rider approved in the *ESP III Order*. *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR *et al*., Opinion and Order (Mar. 31, 2016), Second Entry on Rehearing (Nov. 3, 2016),

Fifth Entry on Rehearing (Apr. 5, 2017) ("*PPA Rider Order*"). In late 2018, this Court addressed the *ESP III Order* and the PPA Rider mechanism, in a pair of decisions. *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4697; *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4698. In the former, the Court dismissed the appeal of the *ESP III Order's* approval of the zero placeholder PPA Rider, finding that the appellants had not been harmed or prejudiced by the approval of a zero placeholder rider. In the latter, the Court unanimously affirmed the Commission's *PPA Rider Order* on the merits.

In the PPA Rider stipulation and recommendation, AEP Ohio agreed to file a separate application with the Commission requesting that its ESP be extended through May 31, 2024. *PPA Rider Order* at 27-30. This appeal concerns OCC's challenge to the Commission's approval of that separate application.

Specifically, in May 2016, AEP Ohio filed an application and supporting testimony in the *ESP III* docket that would, among other things, extend the term of the ESP through May 31, 2024. The Commission's Attorney Examiner then directed AEP Ohio to re-file this application in the above-captioned cases, which AEP Ohio did on November 23, 2016. A technical conference was held regarding the Company's application, a procedural schedule was established, public hearings were held, and numerous interested parties (including OCC) intervened.

In the summer of 2017, AEP Ohio, Commission Staff, and numerous intervenors filed a joint stipulation and recommendation ("Stipulation") for the Commission's consideration to resolve all issues presented in the Company's Application. To assist the Commission in its review of the Stipulation, the Attorney Examiner established a procedural schedule that included an evidentiary hearing, which took place in November 2017. The hearing included testimony from ten witnesses, including five OCC witnesses. After the evidentiary hearing and the submission of

post-hearing briefs, the Commission approved the Stipulation (with modifications) in April 2018. *ESP IV Opinion and Order*.

In its *ESP IV Opinion and Order*, the Commission approved three components of the *ESP IV* Stipulation that OCC now complains about on appeal. First, the Commission approved AEP Ohio's proposal to populate the PPA Rider. *Id.* at 22-23. (OCC Appx. 000029-30.) Second, the Commission approved the establishment of a new Smart City Rider to recover costs associated with two technology demonstration projects (electric vehicle charging stations and microgrids), with the rider to be capped at a total of $21.1 million over four years. *Id.* at 23-24. (OCC Appx. 000030-31.) Third, the Commission approved a zero placeholder Renewable Generation Rider, to recover costs associated with the Company's promised construction of renewable energy facilities in the State of Ohio. *Id.* at 20-22. (OCC Appx. 000028-29.)

Several applications for rehearing were filed, including by OCC. In August 2018, the Commission issued its Second Entry on Rehearing. *Id.*, Second Entry on Rehearing (August 1, 2018). (OCC Appx. 000137.) The Commission expressly addressed OCC's rehearing challenges to the Smart City Rider and Renewable Generation Rider, of which OCC now complains in its Second and Third Propositions of Law, respectively. *Id.* at 16-20. (OCC Appx. 000152-156.) Notably, however, the Second Entry on Rehearing does *not* address the federal preemption challenge that OCC now asserts in its First Proposition of Law, because OCC failed to raise any preemption challenge in its Applications for Rehearing. *See generally id.*; *see also* OCC First Application for Rehearing (May 25, 2018); OCC Second Application for Rehearing (July 20, 2018). (Ohio Power Company ("OPC") Supp. 001; 027)

STANDARD OF REVIEW

This Court may reverse, vacate, or modify an order of the Commission only when, upon consideration of the record, the Court concludes that the order is unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50. The Court will not reverse or modify a Commission decision on questions of fact if the record contains sufficient probative evidence to show that the decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. Here, OCC asserts that its appeal "involves only questions of law, to give consumers the protection of Ohio law." (*See* OCC Br. at 2.) For the reasons set forth below, however, some of OCC's theories do indeed implicate factual findings that the Commission made with respect to certain challenged riders, such as the Smart City Rider that is the focus of OCC's Proposition of Law No. 2. In any event, as the following discussion will show, the Commission made no legal or factual errors with respect to the issues OCC presents, and this Court should affirm the Commission's decision approving the Company's ESP IV.

ARGUMENT

I. Response to OCC Proposition of Law No. 1 – The Federal Power Act, 16 U.S.C. § 791 *et seq*., does not preempt the Commission from approving the PPA Rider, and OCC waived its argument to the contrary.

A. The Court lacks jurisdiction to consider OCC's first proposition of law because OCC failed to raise this issue in its Application for Rehearing.

R.C. 4903.10(B) provides: "No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing." Under this statute, an application for rehearing is a jurisdictional prerequisite to judicial review of a Commission order, which bars the Court "from considering issues that were not raised in an application for rehearing before the commission." *In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶ 60. *See also In re Columbus Southern Power Co*., 138 Ohio St. 3d 448, 2014-Ohio-462, 8 N.E. 3d 863, ¶ 55 (finding that OCC forfeited certain claims on appeal "by failing to present them to the commission on rehearing. That failure jurisdictionally bars the court from considering them"). OCC did not raise its preemption argument in its applications for rehearing. (PUCO Dkt. 178, OCC First Application for Rehearing; PUCO Dkt. 190, OCC's Second Application for Rehearing).[1] (OPC Supp. 001; 027.) It therefore forfeited its preemption argument, leaving the Court without jurisdiction to consider it.

OCC seeks to avoid the unavoidable consequence of its failure to comply with R.C. 4903.10(B) by arguing that the Commission order is void for lack of subject matter jurisdiction. In particular, OCC argues that the Federal Power Act ("FPA") vests exclusive jurisdiction over

[1] Nor did any other party raise the preemption argument in an application for hearing. (PUCO Dkt. 177, Application for Rehearing of Retail Energy Supply Association; PUCO Dkt. 179, Application for Rehearing of Interstate Gas Supply, Inc.) (OPC Supp. 045; 060.)

wholesale energy sales in the Federal Energy Regulatory Commission ("FERC"), so the Commission had no jurisdiction to approve the PPA Rider. OCC then would have this Court conclude that it has jurisdiction over this issue on appeal, despite OCC's failure to raise the preemption issue in its applications for rehearing, because subject matter jurisdiction cannot be waived and may be raised at any time. (OCC Notice of Appeal, p. 2, n. 2; OCC Br. at 7.) This contrived argument has no merit, because ordinary federal preemption does not divest a state commission or state court of subject matter jurisdiction.

Absent a federal statute that establishes an exclusive federal forum for the adjudication of federal claims (often referred to as "complete" preemption or "forum preemption"), a state court or tribunal has subject matter jurisdiction to adjudicate whether a state law or order is, or would be, preempted by federal law.

> Generally, state tribunals have the authority to decide questions of federal law, including questions of federal pre-emption. *El Paso Natural Gas Co. v. Neztsosie* (1999), 526 U.S. 473, 486, fn. 7, 119 S.Ct. 1430, 143 L.Ed.2d 635 ("Under normal circumstances, * * * state courts * * * can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different."). A state tribunal is not deprived of jurisdiction to decide federal questions unless Congress intends a federal forum to be the exclusive jurisdiction in an area, such as it did in the case of the NLRB. See *Internatl. Longshoremen's Assn., AFL-CIO v. Davis* (1986), 476 U.S. 380, 391, 106 S.Ct. 1904, 90 L.Ed.2d 389 (holding that pre-emption under *Garmon* extinguishes state jurisdiction).

Blue Flame Energy Corp. v. Ohio Dep't of Commerce, 171 Ohio App.3d 514, 2006-Ohio-6892, 871 N.E.2d 1227, ¶ 57 (10th Dist.).

OCC's reliance on *Internatl. Longshoremen's Assn., AFL-CIO v. Davis* demonstrates the error of its position here. That case turned on the fact that the National Labor Relations Act is so broad that the Supreme Court found a Congressional intent not only to preempt state regulation of the subject matter covered by the Act but the state courts' "power to adjudicate the claims that

trigger pre-emption." *Id*. at 476 U.S. at 398. Thus, the case illustrates a very limited exception to the general rule that state tribunals have the authority to decide questions of federal preemption, as expressly noted in *Blue Flame Energy Corp.*

Just as the federal securities law at issue in *Blue Flame* did not confer exclusive forum jurisdiction on the Securities and Exchange Commission, the FPA does not confer exclusive forum jurisdiction on FERC. The FPA gives FERC exclusive authority to regulate wholesale sales but "leaves to the States alone, the regulation of 'any other sale' – most notably, any retail sale – of electricity." *Hughes v. Talen Energy Marketing, LLC*, __ U.S. __, 136 S. Ct. 1288, 1292, 194 L.Ed.2d 414 (2016) ("*Talen*"), quoting *FERC v. Electric Power Supply Assn.*, __ U.S. __, 136 S.Ct. 760, 766, 193 L.E.2d 661 (2016) ("*EPSA*"); 16 U.S.C. § 824(b). FERC and the Ohio Commission each has exclusive jurisdiction to regulate in its assigned sphere, but neither is the exclusive *forum* for deciding whether a particular law or regulation encroaches upon the other's jurisdiction. Each has concurrent subject matter jurisdiction to decide whether a state law or order conflicts with federal law and is therefore preempted, subject to review by their respective reviewing courts.

This Court considered a similar jurisdictional issue in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 668 N.E.2d 889 (1996). Cleveland Electric Illuminating Company ("CEI") filed a complaint asking the Commission to find that AEP Ohio violated the Certified Territory Act by selling power at wholesale to Cleveland Public Power, which then sold the power to retail customers in CEI's territory. AEP Ohio moved to dismiss, arguing that the Commission lacked subject matter jurisdiction because its agreement with Cleveland Public Power was a wholesale transaction under FERC's exclusive jurisdiction. The Commission agreed and dismissed the complaint. This Court reversed and remanded, directing the Commission to proceed

with a hearing on CEI's complaint. The Court reasoned that the Commission had subject matter jurisdiction to review the entire transaction, in order to determine whether AEP Ohio was selling power to retail customers in CEI's territory, and that doing so would not encroach on the FERC's jurisdiction over the wholesale contract. *Id*., 76 Ohio St.3d at 525. *See also*, *id*. at 531, (CJ Moyer, dissenting) ("The majority holds that the commission has concurrent [subject matter] jurisdiction over the alleged sham transaction under the Act.") *Cf. State ex rel. Rocky Ridge Dev., L.L.C. v. Winters*, 151 Ohio St.3d 39, 2017-Ohio-7678, 85 N.E.3d 717, ¶ 14 (a writ of prohibition will not issue to prevent a state court from adjudicating a claim that local regulations are preempted by state law "because preemption does not create a jurisdictional defect in the trial court."). Likewise, here, the Commission had the subject matter jurisdiction to determine whether the PPA Rider was a valid charge to retail customers under R.C. 4928.143, and its subject matter jurisdiction would not have been diminished even if OCC actually raised its federal preemption claim as a grounds to disapprove the PPA Rider retail charge.

The Sixth Circuit Court of Appeals applied the same principle in *GTE Mobilnet v. Johnson*, 111 F.3d 469 (6th Cir. 1997). There, cellular service providers sought to enjoin the Commission from adjudicating a cellular service reseller's claims that the providers were charging it discriminatory rates and subsidizing their retail operations with their wholesale profits. The providers asserted that the Commission had no subject matter jurisdiction over the reseller's claims because federal law (47 U.S.C. §332(c)(3)(A)) preempted all state authority "to regulate the entry of or rates charged by [cellular service providers]." The Sixth Circuit rejected that argument. The court held that, because the federal statute expressly provided that it did "not prohibit a State from regulating the other terms and conditions of [cellular service]," the Commission and this Court had the subject matter jurisdiction to decide whether the Commission was preempted from granting

relief to the reseller because it would, in effect, be regulating the rates charged in violation of federal law. *Id*., 111 F.3d at 480.

In addition to these two illustrative cases, which *explicitly* address the Commission's subject matter jurisdiction over cases in which preemption is asserted, there are numerous examples of state regulatory bodies or courts properly exercising their *subject matter jurisdiction* notwithstanding a claim that the state's *regulatory jurisdiction* over the matter is preempted by the FPA. Such cases *implicitly* recognize that state tribunals' subject matter jurisdiction is not lost merely because a party claims its regulatory jurisdiction is preempted. *See, e.g.*, *Matter of Chasm Hydro Inc. v. New York State Dept. of Envtl. Conservation*, 14 N.Y.3d 27, 31, 923 N.E.2d 1137 (2010) (denying petitioner's request for a writ of prohibition and rejecting its argument that state department of environmental conservation was proceeding "in excess of its jurisdiction" by bringing water quality enforcement actions against a federally-licensed dam subject to regulation by the FERC under the FPA); *State ex rel. Util. Comm. v. Carolina Power & Light Co*., 359 N.C. 516, 529, 614 S.E.2d 281 (2005) (affirming that state commission had subject matter jurisdiction to determine whether its pre-sale review of a utility's proposed grant of native load priority to a wholesale customer to be supplied from same plant serving retail customers would violate the FPA's grant of exclusive jurisdiction to regulate the sale of energy at wholesale); *Detroit Edison Co. v. Michigan PSC*, 227 Mich. App. 442, 447, 575 N.W.2d 808 (1998) (affirming state commission's exercise of its subject matter jurisdiction to determine its approval of retail wheeling program was not preempted by federal law), *rev'd on other grounds, sub nom. Consumers Power Co. v. PSC,* 460 Mich. 148, 696 N.W.2d 126 (1999); *Commonwealth Electric Co. v. Department of Public Utilities*, 397 Mass. 361, 375-79, 491 N.E.2d 1035 (1986) (implicitly recognizing that state DPU had subject matter jurisdiction to proceed notwithstanding claim that its regulatory

jurisdiction was preempted by federal law). The error in OCC's reasoning is apparent. OCC mistakenly assumes that the preemption of state *regulatory jurisdiction* – indeed the mere assertion of a preemption claim – equates to the loss of *subject matter jurisdiction* over the pending matter.

That OCC is seeking to manufacture a run-around to cure its waiver of the preemption issue in this case is further apparent from the fact that OCC asked the Commission to exercise its subject matter jurisdiction over OCC's preemption claim in the case in which the Commission first approved the PPA Rider as a legitimate retail rate-making mechanism. In AEP Ohio's *ESP III* Case, OCC affirmatively raised the argument that the FPA preempted the Commission's authority to approve the PPA Rider. The Commission, as is its practice, deferred ruling on the constitutional issue finding that it would be best reserved for this Court's determination. *ESP III*, Fourth Entry on Rehearing, ¶ 67-70 (Nov. 3, 2016). OCC then raised its federal preemption argument in its appeal of the Commission's order to this Court. The Court, however, dismissed OCC's appeal and never reached the merits. *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4697, ¶ 18. For reasons known only to it, OCC did not raise its preemption argument in either the subsequent *PPA Rider* Case or this case.

Because the FPA recognizes the States' continued jurisdiction to regulate retail electricity sales, among other things, and does not establish the FERC or the federal courts as the exclusive forum for adjudicating whether the FPA preempts a state action, the Commission unquestionably had subject matter jurisdiction to determine whether the PPA Rider charge is lawful and appropriate. OCC should have asserted its unexpressed federal preemption claim in the proceeding below, and thereby preserved it for review by this Court. It chose not to do so. Consequently, OCC forfeited its preemption argument by failing to raise it in its application for rehearing, and OCC's first proposition of law should not be considered.

B. The Commission's jurisdiction to approve the PPA Rider is not preempted by federal law.

Should the Court determine it has jurisdiction to entertain OCC's federal preemption argument notwithstanding OCC's waiver of that claim, the Court should hold that the argument has no merit. OCC's argument that the FPA preempts the PPA Rider misstates the scope of the FPA and misapprehends the import of recent U.S. Supreme Court case law interpreting the Act. The PPA Rider is undisputedly a *retail* rate. It does not set or otherwise mandate *any* wholesale rates or charges or require AEP Ohio to engage in or continue any wholesale transactions. It is, therefore, soundly within the broad authority that the FPA gives to the States to regulate retail electricity charges.

As noted above, under the FPA, FERC has "exclusive authority to regulate 'the sale of electric energy at *wholesale* in interstate commerce.'" (Emphasis added.) *Talen,* 136 S. Ct. at 1292). Critically, "the law places beyond FERC's power and leaves to the States alone, the regulation of 'any other sale' – most notably, any *retail* sale – of electricity." (Emphasis added.) *Id.*, quoting *EPSA,* 136 S. Ct. at 766; 16 U.S.C. § 824(b). The line between wholesale electricity sales (which are FERC's exclusive province) and retail electricity sales (which belong to the states) is clearly drawn. "A wholesale sale is defined as a 'sale of electric energy to any person for resale.'" *Talen*, 136 S. Ct. at 1292, quoting 16 U.S.C. § 824(d). A retail sale, in contrast, is defined as a sale "directly to users" of electricity. *EPSA*, 136 S. Ct. at 768. That is, a retail sale is a sale to the homes, businesses, and industries that ultimately consume the electricity. "State utility commission[s] continue to oversee those transactions." *Id.*

Here, all of AEP Ohio's tariffs for electric service to end-use customers – including the riders in past ESPs and the ESP challenged here – are retail charges (or credits) subject to the exclusive jurisdiction of the Commission, not FERC. This includes the PPA Rider. The PPA

Rider, as part of AEP Ohio's ESP, is undisputedly a *retail* rate involving *retail* credits and charges to end-users of electricity in AEP Ohio's service territory. OCC expressly concedes this in its brief, acknowledging that the PPA Rider involves "a retail charge" to AEP Ohio's "distribution customers." (OCC Br. at 8; *see also id.* at 9 (acknowledging that the PPA Rider "would be a nonbypassable *retail* credit * * *.").) The PPA Rider is one part of the rates and charges that AEP Ohio assesses for delivering electricity "directly to users" in its service territory. *EPSA*, 136 S. Ct. at 768. As such, the PPA Rider is clearly within the Commission's power to regulate "any retail sale" under the FPA. *Id.*; *Talen*, 136 S. Ct. at 1292; 16 U.S.C. § 824(b) (OCC Appx. 000195).

Significantly, this Court has thoroughly reviewed the intent, structure, and effect of the PPA Rider and found it to be a proper component of AEP Ohio's Standard Service Offer to retail customers. In Case No. 17-752, the Court affirmed the Commission's decision that the PPA Rider is a proper retail charge under R.C. 4928.143(B)(2)(d) because it is "a charge that acts as a financial limitation on customer shopping for retail electric-generation service, promotes stable retail electric service prices, and ensures customer certainty regarding retail electric service." *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4698, ¶ 26, 68. The Commission's finding, now affirmed by this Court, is final and binding, and cannot be collaterally attacked in this proceeding. *In re Ohio Power Co.*, 144 Ohio St. 3d 1, 2015-Ohio-2056, 40 N.E. 3d 1060, ¶ 20 ("These doctrines [of claim preclusion and issue preclusion] operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."); O*ffice of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9, 10, 475 N.E.2d 782 (1985).

The finding that the PPA Rider is a retail charge to promote stable retail electric service prices refutes OCC's mischaracterization that the PPA Rider is a charge to consumers to subsidize

the OVEC power plants. (OCC Br. at 4.) And it negates OCC's position that the PPA Rider conflicts with federal law. In re-affirming in *EPSA* the broad powers reserved to the States, the Supreme Court noted that "States continue to make or approve all retail rates, and in doing so may insulate them from price fluctuations in the wholesale market." 136 S. Ct. at 777. That is precisely the intent and long-term effect of the PPA Rider – to insulate Ohio retail customers from price fluctuations in the wholesale market. Ohio consumers are not paying the charge to subsidize the OVEC power plants or AEP Ohio's resale of the generation in the PJM market. Ohio consumers are paying the charge to receive the benefit of a hedge against volatile wholesale market. This is particularly apparent in this case because OVEC's costs "are relatively stable in comparison to the wholesale-power market, and they rise and fall in a manner that is countercyclical to the market, thereby creating a hedge for ratepayers." *In re Application of Ohio Power Co.*, 2018-Ohio-4698, ¶ 4.

While acknowledging that the PPA Rider is a "retail" rate, OCC nevertheless claims that the PPA Rider is akin to a state program that the U.S. Supreme Court struck down as preempted by the FPA in *Talen*. (OCC Br. at 7-8.) But the state program in *Talen* is plainly distinguishable from the PPA Rider, and OCC is attempting to stretch the meaning of the *Talen* decision far beyond what it can bear. Most importantly, unlike the state program in *Talen*, the PPA Rider does not mandate that AEP Ohio (or anyone else) enter into any wholesale contract or pay any wholesale rate.

The state program in *Talen* "required" certain Maryland utilities to enter into a 20-year pricing "contract for differences" with a state-selected generator at a specified wholesale rate. 136 S. Ct. at 1294-1295. That program actually set the wholesale rate the generator would receive and "guarantee[d]" that the generator received "the contract price rather than the [FERC-approved]

auction clearing price" for its electricity sales. *Id.* at 1295. The Supreme Court held that mandating this wholesale transaction violated the FPA because, by requiring utilities to guarantee the contract price to the generator, the Maryland program "set[] an interstate wholesale rate" that was different from the FERC-approved rate. *Id.* at 1297.

The PPA Rider is starkly different from Maryland's program, because it does not set any wholesale rate or mandate any wholesale transaction. AEP Ohio *voluntarily* entered into its purchase power agreement with OVEC, a negotiated, bilateral agreement subject to FERC's jurisdiction for reasonableness review. *Id*. at 1292-1293. And, unlike the "contract for differences" mandated by Maryland, the OVEC agreement actually transfers ownership of capacity from the generator to AEP Ohio. *Id*. at 1295; *ESP III Order* at 8. AEP Ohio, as the new owner of that capacity, sells the capacity into the PJM market and receives the auction clearing price for capacity and the locational marginal price for energy, which are market prices set through the FERC-approved PJM process. This second wholesale transaction likewise is a completely voluntary business decision on the part of AEP Ohio. The Commission did not mandate either of these wholesale transactions, and indeed, has encouraged AEP Ohio to extricate itself from its OVEC commitment. *Id*. at 23.

In approving the PPA Rider, the Commission acted solely in its proper retail sphere. The PPA Rider merely allows AEP Ohio to pass on the net costs, or net revenue, derived from these completed (and FERC-approved) wholesale transactions to its retail customers as a hedge against volatile market-based rates. In so doing, the PPA Rider carefully respects the line between state and federal jurisdiction in the FPA. The PPA Rider does not mandate that AEP Ohio enter into any wholesale contract, nor does it mandate, or even incidentally affect, any wholesale rate or charge. And, most importantly, it is not "setting the revenue for wholesale capacity and energy

that AEP Ohio receives for its interest in OVEC," as OCC argues. (OCC Br. at 9.) The rider only determines the amounts retail customers pay to AEP Ohio, or the credit retail customers receive, as a result of the financial hedge consummated by the *completed* wholesale transactions.

OCC nevertheless argues that the rider is unlawful because the revenue AEP Ohio receives from it is "'tethered' to the wholesale rate." (OCC Br. at 9, citing *Talen*, 136 S.Ct. at 1299. Its argument is legally and factually incorrect. The rider is not in any way "tethered" to the generator's wholesale market rate, as was the case in *Talen*. The PPA Rider approved in the proceeding below is a *status quo* continuation of the rider approved in the PPA Rider Case. The approved rider includes AEP Ohio's commitment to guarantee that the rider will produce credits starting in the 2020-2021 planning year and continuing to 2024 of at least $15 million. *PPA Rider Order* at 24; *PPA Rider* Second Entry on Rehearing, ¶ 60. It also limits the amount related to the rider that can be charged to any customer to 5% of the customer's June 2015 SSO. (*PPA Rider Order* at 81.) Thus, the rider is not tethered to the wholesale rate and it is does not, as OCC suggests, "guarant[ee] a rate (intended to cover all OVEC-related costs) distinct from the clearing price in the PJM markets." (OCC Br. at 9.)

But, in any event, OCC misreads *Talen* to suggest that any "tether" between a retail rate and a wholesale rate would be *per se* impermissible. That is not what the Supreme Court stated or implied. The Court merely clarified its limited holding that the Maryland program violated federal law "because it disregards an interstate wholesale rate required by FERC," stating: "Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.' Brief for Respondents 40." The Court's limiting statement (referencing a term plucked from the Respondents argument) that its decision does not affect measures "untethered to

a generator's wholesale market participation" cannot be stretched into a conclusion that all measures in any way connected to wholesale market participation are prohibited. Indeed, in the current state regulatory environment AEP Ohio's wholesale market participation is a significant and unavoidable component of retail rates, as the Commission, at the urging of OCC and others, requires AEP Ohio to satisfy its SSO obligations by purchasing power in the wholesale market.[2] *ESP III Order* at 31; *ESP IV Opinion and Order* at 44-45.

The Court also affirmatively stated in *Talen*: "Our opinion does not call into question whether generators and LSEs (load serving entities) may enter into long-term financial hedging contracts based on the auction clearing price," reasoning that such contracts "do not involve state action to the same degree as Maryland's program, which compels private actors (LSEs) to enter into contracts for differences –like it or not –with a generator that must sell its capacity to PJM through the auction." *Id*. at 1299, fn.12. If the Court was not questioning voluntary long-term financial hedging contracts based on auction clearing prices in a purely wholesale transaction between a generator (wholesale seller) and LSE (wholesale buyer), it hardly was suggesting that a long-term hedging mechanism in a purely retail context would be impermissible because it was based, in part, on the auction clearing price received by the utility.

It also is significant that the PPA Rider is intended to insulate retail customers from the effects of a volatile market, as encouraged by R.C. 4928.02(A) and authorized by R.C. 4928.143(B)(2)(d). In both *EPSA* and *Talen*, the Supreme Court carried over to the FPA the preemption test articulated in *Oneok, Inc. v. Learjet, Inc*., __ U.S. __, 135 S.Ct. 1591, 191 L.E.2d

[2] Moreover, competitive retail electric suppliers continue to serve shopping load of AEP Ohio and the above-described approach of liquidating power from OVEC into the wholesale market is undertaken to avoid retail concerns by retail competitive providers. While competitive suppliers participated in the proceeding below, they supported the settlement adopted in the *ESP IV Opinion and Order* and none of them are before this Court.

511 (2015). *EPSA*, 136 S.Ct. at 776; *Talen,* 136 S.Ct. at 1298. Under *Oneok*, the "significant distinction" for purposes of preemption is the distinction between state programs "aimed directly at the interstate purchasers and wholesale sales for resale, and those aimed at subjects left to the state to regulate." (Emphasis deleted.) 135 S.Ct. at 1600. The "target" of the PPA Rider, to use the *Oneok* vernacular, is stabilizing retail electric service by means of a financial hedge supported by retail rates; the rider does not target interstate wholesale purchasers or sales for resale, as did the Maryland program rejected in *Talen*.

The PPA Rider, by intent, structure and effect, is, therefore, far afield from *Talen*'s "limited" holding and falls plainly within the Commission's jurisdiction to set *retail* rates.

II. Response to OCC Proposition of Law No. 2: The Commission's decision to adopt the Smart City Rider under Division (B)(2)(h) of the ESP statute, R.C. 4928.143, is lawful and reasonable.

In its Opinion and Order in the case below, the Commission thoroughly explained the background and context of its decision to approve the Smart City Rider as part of AEP Ohio's ESP IV:

> [I]n June 2016, the city of Columbus won the Smart City Challenge and received a $40 million grant from the U. S. Department of Transportation to be the model for connected cities of the future. In addition, as the winner of the Smart City Challenge, the city of Columbus received a $10 million grant from Vulcan, Inc., a Paul Allen Company, to focus on decarbonization of the energy and transportation sectors. Despite the name, the Smart Columbus Plan is a region-wide, comprehensive, integrated plan to address an array of urban mobility and transportation challenges faced by central Ohio communities using new technologies, including, but not limited to, connected infrastructure, electric vehicles and EV charging station infrastructure and integrated data platforms, and autonomous vehicles. The purpose of the Smart Columbus Plan is to improve people's quality of life particularly in underserved communities, drive growth in the economy, provide better access to jobs and ladders of opportunity, and foster sustainability. It is the Commission's understanding that AEP Ohio committed to support the Smart Columbus Plan particularly with regard to decarbonization of the power supply and other carbon emission

> reduction strategies, to advance the deployment of EV charging stations, and to seek regulatory approval for the associated projects, as necessary.

ESP IV Opinion and Order at ¶ 172. (OCC Appx. at 000081.) Obviously, the City of Columbus was thrilled to have won a nationwide competition for the Smart City Challenge and considered this an incredible opportunity for Ohio. The Smart City Rider approved below is modestly designed to implement two discrete and narrow components supporting Smart Columbus in a way that benefits AEP Ohio customers throughout Ohio: (1) an EV rebate program, and (2) a microgrid demonstration.

The Commission summarized the EV rebate component of the Smart City Rider programs as follows:

> AEP Ohio has agreed, as part of the Stipulation, to initiate and operate an EV charging station rebate program. The program will offer up to $10 million in rebates, including AEP Ohio administrative fees, on a competitively neutral basis, for up to 375 network-connected, smart EV charging stations. AEP Ohio has committed to ensuring that at least ten percent of the charging stations will be reserved for low-income geographic areas. AEP Ohio will access or receive data from the charging stations installed as part of the program and the data will be shared with the Signatory Parties and in a final report to be available to the public. The Signatory Parties assert that the EV charging station project will provide AEP Ohio, the Commission, and other interested stakeholders with information regarding siting considerations, pricing, and affordability, in order to optimize resources, ensure system reliability, and facilitate well informed utility planning decisions. EVCA [the electric vehicle charging association comprised of competitive providers] and Staff endorse the charging station rebate program for its ability to foster a scalable and sustainable competitive market for electric vehicles and charging stations in Ohio. According to EVCA, the rebate program facilitates a competitive market among charging station participants, limits utility development risk, and enhances innovation, competition, and customer choice.

Id. at ¶ 159. (OCC Appx. 000075.) Thus, the EV rebate program is competitively-neutral, designed to benefit public-serving facilities, and includes low-income target benefits.

The other component of the Smart City Rider is the microgrid demonstration, as was also described in the Commission's decision:

> A microgrid is a small-scale power grid that can operate independently, also referred to as islanding, or in conjunction with the electric grid. As AEP Ohio witness Allen described it, the critical components of a microgrid are a battery storage system and smart controls that can island the microgrid and keep the power flowing within the microgrid using energy stored in the batteries. Microgrids may include small-scale generation such as solar arrays, wind turbines, or small gas-fired generators that can supplement the energy and capacity provided by battery storage systems during islanding. Islanding allows electric service to be maintained to critical facilities during an outage.

Id. at ¶ 167. (OCC Appx. 000079.) Like the EV component, the microgrid demonstration is also competitively-neutral and designed to benefit public-serving facilities – as further discussed below.

OCC claims that the Smart City Rider does not relate to "distribution service" as required by R.C. 4928.141 and 4928.143(B)(2)(h). (OCC Br. at 10.) Appellant goes on to complain that the Smart City programs "occupy space behind the customers' meter" which "should be occupied by providers in the competitive market" not the utility." (*Id.*) OCC concludes by characterizing the Commission's decision below as causing AEP Ohio customers to "subsidize" these programs, concluding that the Smart City Rider is unlawful and not authorized under the ESP statute. (*Id.*) Its conclusion relies on this Court's holding in *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512 (2011). (*Id.* at 12.) In *Columbus Southern Power*, the Court held that ESP provisions must fit into one of the categories listed in Division (B)(2) of the ESP statute. 2011-Ohio 1788, at

¶ 32. Because the Smart City Rider is authorized by Division (B)(2)(h), the *Columbus Southern Power* holding is not controlling here.

Because the EV and microgrid components are encompassed by the ESP statute, promote energy policies, and are otherwise competitively-neutral, Appellant is mistaken in claiming the Smart City Rider is unlawful. In reality, OCC seeks to challenge the Commission's underlying factual findings and explanation for classifying the Smart City Rider under Division (B)(2)(h) of the ESP statute. As such, Appellant bears a "heavy burden" because the Court has consistently deferred to the Commission's judgment "in matters that require the commission to apply its special expertise and discretion to make factual determinations." *Ohio Consumers' Counsel v. Pub. Util. Comm*., 117 Ohio St.3d 301, 2008-Ohio-861, ¶ 13; *see also Stephens v. Pub. Util. Comm.,* 102 Ohio St.3d 44, 2004-Ohio-1798, 806 N.E.2d 527, ¶ 16.

Contrary to OCC's arguments, the Commission correctly concluded that the Smart City Rider with its EV and microgrid demonstration programs "fall squarely within the parameters of R.C. 4928.143(B)(2)(h)." *ESP IV Opinion and Order* at ¶ 238. (OCC Appx. 000116.) The Commission specifically found that the Smart City programs satisfy both branches of R.C. 4928.143(B)(2)(h):

> The Commission finds that the EV charging station and the microgrid demonstration programs, as proposed in the [Smart City Rider], are permissible provisions of an ESP, pursuant to R.C. 4928.143(B)(2)(h). In accordance with R.C. 4928.143(B)(2)(h), an ESP may specifically include incentive ratemaking provisions or distribution infrastructure and modernization incentive provisions. The [Smart City Rider] meets the requirements of either provision—as an incentive for AEP Ohio to support the Smart Columbus Plan and * * * meets the distribution infrastructure and modernization incentive provisions. The EV charging station and microgrid demonstration programs will be available throughout AEP Ohio's service area (Tr. I at 30). It is important that future technology, such as EV charging stations and microgrids, and their respective impact on the distribution system, be evaluated.

Id. at ¶ 173. (OCC Appx. 000082.)

Under a common sense and plain meaning view of the "distribution infrastructure and modernization" and "incentive ratemaking" categories, the Smart City programs would be encompassed within Division (B)(2)(h)'s broad, undefined phrase "regarding the utility's distribution service." *Accord Cablevision of the Midwest v. Gross*, 70 Ohio St.3d 541, 545, 639 N.E.2d 1154 (1994) (holding that a reasonable use of a broad, undefined statutory term would be to reflect the General Assembly's belief that the statute should be broad and inclusive); *see also Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 44 (rejecting the Commission's unduly narrow construction of the statutory term "arrangement"). Thus, by using broad phrases like "regarding the utility's distribution service," "distribution infrastructure and modernization" and "incentive ratemaking," the General Assembly has by necessity included within those phrases programs that are related to distribution service such as the Smart City programs.

The Commission's specific factual findings regarding the Smart City programs bolster this conclusion. For example, the Commission recognized the public-serving and learning nature of the microgrid demonstration in approving it:

> The Commission notes that the focus for the microgrid project will be nonprofit, public-serving entities, including medical facilities and fire and police stations (Co.Ex. 1 at 9). Such facilities are crucial to every Ohio community and particularly critical during widespread emergencies and extended power outages. Over the past several years, the United States has experienced severe, widespread electric service outages due to weather. We agree with Staff that the microgrid demonstration project can provide important information for the expanded use of microgrid technology (Staff Ex. 1 at 3).
> Certain details that OCC views as critical to the approval of the microgrid demonstration project, such as project design specifications, evaluation criteria, and a requirement to perform a cost benefit analysis, the Commission finds to be overly restrictive

> and detrimental to the development of the project, at this stage. The microgrids must be designed to serve the needs of the customer recipients.

ESP IV Opinion and Order at ¶ 174. (OCC Appx. 000082.) The Commission further recognized, in approving the microgrid demonstration, the pilot program's potential for improving reliability of future electric service in approving it:

> As a demonstration pilot, it is important that the project be flexible and designed to provide valuable information with controls in place to protect AEP Ohio's ratepayers. * * * In accordance with Ohio Adm.Code 4901:1-10-08, every electric utility's emergency plan must take into account the restoration of electric service to hospitals, fire, and police, usually restoring service to these entities first. The implementation of this microgrid demonstration pilot may afford AEP Ohio a better method to improve service reliability to hospitals, fire, and police stations.

Id.

The Commission plainly made factual findings regarding the nexus between the Smart City programs and electric distribution service. And as this Court has held many times, "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17-18, 734 N.E.2d 775 (2000); *see also Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 41; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 69; *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶ 40; *Monongahela Power Co.*, 2004-Ohio-6896, at ¶ 30.

The Commission also found that the Smart City Rider and demonstration programs further state policies. As this Court has held, the codified energy policies in R.C. 4928.02 are a "guideline [s] for the commission to weigh" in evaluating utility proposals to further state policy goals, and

it has been "left * * * to the commission to determine how best to carry [them] out." *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655 (2011), ¶ 62, quoting *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, 926 N.E.2d 261, ¶ 39-40. Consistent with the framework, the Commission recited its intention in rendering the decision below to be "guided by the policy of the state as established by the General Assembly in R.C. 4928.02." *ESP IV Opinion and Order* at ¶ 37. (OCC Appx. 000022.) And the Commission adopted findings below that the Smart City programs promote safe and reliable electric service, competition, innovation, and access to information. *Id.* at ¶ 238 (OCC Appx. 000116) (finding that the Smart City Rider demonstration programs "further the state policy in R.C. 4928.02(A), (C), (D), (E), (F), and (N), among others"). The Commission's consideration and reliance on the codified energy policies further bolsters the lawful and reasonable nature of its findings that the Smart City Rider is authorized by the ESP statute because it is directly related to AEP Ohio's "distribution service," the Company's "distribution infrastructure," and AEP Ohio's efforts at "modernization." R.C. 4928.143(B)(2)(h).

Moreover, with respect to the EV rebate program in particular, the Commission recognized that "a significant increase in the number of electric vehicles will have an impact on electric demand." *ESP IV Opinion and Order* at ¶ 175. (OCC Appx. 000083.) The Commission further recognized that "a significant increase in the number of electric vehicles will have an impact on electric demand" and "[n]ow is the time" for AEP Ohio "to be aware of and prepare for the potential impact on the electric market" and "the impact on the electric grid, electric distribution, and distribution infrastructure" that will come from EV adoption. *Id.* Consequently, the Commission properly found that the EV charging station demonstration project will directly respond to these challenges to the distribution grid and "allow AEP Ohio, this Commission, and

other interested stakeholders to analyze the data from the project regarding load growth at peak and off-peak hours, rates, and rate design criteria, and to determine potential concerns and benefits." *Id.* at ¶ 176.

These factual findings of the Commission show that the Smart City Rider directly concerns matters regarding "the utility's distribution service," "distribution infrastructure," and "modernization" as required by R.C. 4928.143(B)(2)(h). Growth in EV adoption will significantly impact AEP Ohio's distribution grid. Thus, the EV rebate program is directly related to AEP Ohio's "distribution infrastructure" (among other things) since it will allow AEP Ohio to gather many types of data that will help AEP Ohio, stakeholders, and the Commission respond to the load growth and grid impacts that will result from EV adoption. Of course, while OCC may disagree with the Commission's factual findings, the Court imposes a "heavy burden for the party challenging an order, because [it] has consistently deferred to the commission's judgment in matters that require the commission to apply its special expertise and discretion to make factual determinations." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 117 Ohio St.3d 301, 2008-Ohio-861, 883 N.E.2d 1035, ¶ 13; *see also Stephens*, 2004-Ohio-1798, ¶ 16; *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 92 Ohio St.3d 177, 180, 749 N.E.2d 262 (2001); *AT & T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154, 555 N.E.2d 288 (1990); *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 108, 346 N.E.2d 778 (1976).

The Smart City Rider demonstration programs are also directly related to the distribution *rates* that AEP Ohio charges for EV and microgrid load. As the Commission recognized, the data gathered in the demonstration programs will aid AEP Ohio, stakeholders, and the Commission in designing rates for EV charging stations and microgrids. The EV charging station demonstration project will be of sufficient size to allow AEP Ohio, this Commission, and other interested

stakeholders to analyze the data from the project regarding load growth at peak and off-peak hours, rates, and rate design criteria, and to determine potential concerns and benefits. *ESP IV*, Opinion and Order at ¶176. And the Commission stated that it "expects that AEP Ohio will incorporate lessons learned from the EV charging station and microgrid demonstration projects into the [plug-in electric vehicle] tariff and other future tariff filings, including rate design that encourages load management to enhance potential reliability benefits to the distribution system as a result of EV charging." *Id*. at ¶ 179. AEP Ohio's plug-in electric vehicle tariffs, "rate design that encourages load management," and "potential reliability benefits to the distribution system" are core distribution concepts. Thus, the Smart City Rider is a provision "regarding distribution infrastructure and modernization incentives for the electric distribution utility." R.C. 4928.143(B)(2)(h).

In addition, the Commission made yet another set of findings that the Smart City Rider microgrid demonstration pilot involves matters regarding AEP Ohio's provision of reliable distribution service to critical public-serving infrastructure that benefits all customers. As the Commission recognized, under Ohio Adm. Code 4901:1-10-08, "every electric utility's emergency plan must take into account the restoration of electric service to hospitals, fire, and police, usually restoring service to these entities first." *ESP IV Opinion and Order* at ¶ 174. The Commission correctly concluded that "[t]he implementation of this microgrid demonstration pilot may afford AEP Ohio a better method to improve service reliability to hospitals, fire, and police stations." *Id.* This is yet another way in which the Smart City Rider programs relate to AEP Ohio's "distribution service," "distribution infrastructure," and "modernization." R.C. 4928.143(B)(2)(h).

Regarding OCC's argument that the Smart City Rider programs occupy space behind the customers' meter which should be occupied by providers in the competitive market (OCC Br. at 10), this argument is flawed in multiple respects. To begin with, OCC overlooks the fact that AEP Ohio is providing only rebates in the EV demonstration program; it will not own the EV charging stations. As the Commission recognized, "[r]ebate programs, as a general matter, are not equivalent to an anticompetitive subsidy." *ESP IV*, Opinion and Order at ¶ 239. Indeed, the actual EV charging station development itself will be done not by the utility, but by the "providers in the competitive market" (to use OCC's words). As the Stipulation makes clear, the Company will qualify multiple equipment vendors and the participating customers will directly purchase the EV charging station on a competitive basis. *ESP IV*, Joint Stipulation and Recommendation at ¶ III.H.1.a (Aug. 25, 2017) (OPC Supp. 100.) This factual distinction undercuts OCC's claim that AEP Ohio is somehow attempting to "occupy space behind the customer's meter." This also shows that the Smart City programs are competitively-neutral and is further evidenced by the support of all competitive providers involved in the case. *ESP IV Opinion and Order* ¶ 158-159 and 168 (OCC Appx. 000074-75, 79); *ESP IV*, Joint Stipulation and Recommendation (Aug. 25, 2017) (OPC Supp. 86). In any case, there is nothing in R.C. 4928.143(B)(2)(h) that makes the "behind the meter" argument relevant or dispositive – and OCC's philosophical objection about competitive concerns is emasculated by the Commission's findings and universal support for the proposal by all competitive intervenors below.

Moreover, the Commission has authorized similar appliance rebate programs in the past, even under its traditional ratemaking authority. For example, consistent with R.C. 4909.15 and R.C. 4905.13, the Commission established a process decades ago for deferral and recovery of Demand-Side Management expenses including rebates on customer-owned heat pumps and other

customer-owned load management devices. *In the Matter of the Commission's Investigation into the Impacts of Demand-Side Management Programs*, Case No. 90-723-EL-COI, Entry on Rehearing (Apr. 4, 1991) (adopting Revised Appendix A which permits deferral and recovery of cost-effective appliance rebate program costs); *In re Columbus Southern Power Company*, Case No. 94-1812-EL-AAM, Entry (Apr. 13, 1995) (allowing deferral of demand-side management program costs included heat pump rebates to be deferred for recovery in base rates); *In re Ohio Power Company*, Case No. 94-996-EL-AIR, Opinion and Order (Mar. 23, 1995) (allowing demand-side management costs to be deferred and reflected in base rates). If such rebate costs are permitted under traditional ratemaking in R.C. Chapter 4909, such costs are surely permitted in the more flexible and progressive alternative ratemaking provisions in division (B)(2)(h) of the ESP statute – especially given that the programs advance energy policy goals in R.C. 4928.02.

Further, the Court should reject OCC's attempt to create a false dichotomy between "the customers' side of the meter" and AEP Ohio's "side" of the meter, because the "side" of the meter has no basis in the statutory language used in Division (B)(2)(h) of the ESP statute. The statute simply does not use this concept, and tellingly OCC cites no authority supporting its flawed premise that distribution service cannot occupy space behind the meter. Rather, the statute authorizes for inclusion in an ESP "[p]rovisions regarding the utility's distribution service," including (among other things) "provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility." R.C. 4928.143(B)(2)(h). Even if OCC were correct that the EV charging rebate program or the microgrid demonstration do not constitute distribution service (which it is not), the statute only requires that the Smart City Rider be a provision "regarding" distribution infrastructure – which is a much broader concept. For the reasons discussed above and in the Commission's Order, the Smart City Rider and its

demonstration programs meet that statutory test. Thus, the Commission need not – and should not – give credence to OCC's "side of the meter" concept or attempt to delineate permissible and impermissible utility action using this concept based on Appellant's marginal philosophical views about competition. The Smart City Rider is just and reasonable, authorized by statute, and in the public interest; that should be the end of the inquiry.

In approving the Smart City Rider, the Commission summarized the relationship to electric distribution service and expected reliability and system planning benefits as follows:

> In light of the modest cost of the demonstration projects, the benefits to be afforded to customers, and the vast array of benefits provided to the public interest as a result of the Smart Columbus Plan, the Commission finds that the [Smart City Rider] should be approved as proposed in the Stipulation. The [Smart City Rider] benefits AEP Ohio customers and the public interest by fostering the goal of increasing the number of electric vehicles locally, facilitating the travel of electric vehicles to and through the state, reducing carbon emissions, and supporting the provision of critical services in emergencies. The [Smart City Rider] demonstration projects will help to prepare Ohio for advances in the transportation and electric market, position the state for new industry, and balance the needs of AEP Ohio's customers throughout the Company's service territory, while supporting the benefits offered in the Smart Columbus Plan.

ESP IV Opinion and Order at ¶ 178. (OCC Appx. 000085.) On rehearing, the Commission went on to emphasize the importance of this concept:

> The Commission notes that OCC's request for rehearing overlooks the fact that the city of Columbus, through its Smart City Plan, has a region wide goal to increase the number of EVs to approximately two percent by 2020. *It is imperative that AEP Ohio and this Commission understand the impact EVs and EV charging stations have on electric service and service reliability. It is also essential that we understand the potential impact of microgrid technology on electric service.* Microgrids, particularly the expanded implementation of microgrid technology, offer the ability to reduce the number of outages experienced and the impact of extended outages on the affected communities. The Commission finds that both are important service considerations for AEP Ohio's customers.

ESP IV, Second Entry on Rehearing at ¶ 47 (emphasis added). (OCC Appx. 000154-155.)

In sum, the Commission's factual findings are supported by the record and its detailed explanation of how the Smart City Rider fits under Division (B)(2)(h) of the ESP statute is reasonable and lawful. As this Court has held many times, "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d at 17-18. Likewise, the Court should defer to the Commission's expert and reasonable determination below that a more straightforward view of division (B)(2)(h) of the ESP statute factually supports the Smart City programs as being either "distribution infrastructure and modernization" and "incentive ratemaking" under division (B)(2)(h) of the ESP statute and as being programs that are "regarding the utility's distribution service." Accordingly, the Commission's adoption of the Smart City Rider under Division (B)(2)(h) of the ESP statute is lawful and reasonable.

III. <u>Response to OCC Proposition of Law No. 3:</u> The Commission properly approved the placeholder Renewable Generation Rider under R.C. 4928.143(B)(2)(c) without adjudicating the need for specific renewable generating facilities in the case below, and the placeholder rider causes no harm or prejudice to ratepayers.

The Court should decline to consider OCC's third proposition of law consistent with its analysis and holding dismissing OCC's appeal of the Commission's *ESP III* Order. *In re Application of Ohio Power Co*, 2018-Ohio-4697, ¶ 18. In that case, the Commission approved the establishment of a zero placeholder PPA Rider and required Ohio Power to demonstrate in a separate proceeding that it was entitled to cost recovery through the PPA Rider. *Id*. at ¶ 4. The Court found that, because the placeholder rider "did not allow Ohio Power to recover any costs from customers," there was no injury or prejudice to them. *Id*. at ¶ 15. The Court dismissed the appeal, stating:

> The party seeking reversal of the commission's order must demonstrate prejudice or harm from the order on appeal. *Holladay Corp.*, 61 OhioSt.2d 335, 402 N.E.2d 1175, at syllabus; *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 88, 765 N.E.2d 862 (2002). OCC and OMAEG have not shown any harm or prejudice to ratepayers caused by the commission's approval of the PPA Rider in the ESP Order. As appellants have failed to carry their burden before this court, we dismiss this appeal.

Id. at ¶ 18.

The parallel between that case and OCC's third proposition of law is unmistakable. In its *ESP IV Opinion and Order*, the Commission approved the Renewable Generation Rider as a placeholder only. The Rider will not allow AEP Ohio to recover any costs from customers unless AEP Ohio establishes the requisite need for such cost recovery in a separate proceeding. Proceedings are presently pending regarding the need for renewable energy projects whose costs would be recovered through the Renewable Generation Rider. *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 18-501-EL-FOR;

In the Matter of the Application of Ohio Power Company for Approval to Enter into Renewable Energy Purchase Agreements for Inclusion in the Renewable Generation Rider, Case No. 18-1392-EL-RDR; *In the Matter of the Application of Ohio Power Company for Approval to Amend its Tariffs*, Case No. 18-1393-EL-ATA. OCC is actively participating in the proceedings. If the Commission allows cost recovery through the Renewable Generation Rider as a result of the pending proceedings, OCC will have standing to appeal the collection of those charges from customers.

But then is not now.

R.C. 4928.143(B)(2)(c) authorizes the Commission to approve a placeholder rider to recover the costs of a new renewable generation facility. (OCC Appx. 000190). Before it may authorize a surcharge to be collected through such a rider, the Commission must "first determine[ ] in the proceeding that there is a need for the facility based on resource planning projections submitted by the electric distribution utility." *Id.* The Commission properly approved just such a rider, the Renewable Generation Rider, in the case below. *ESP IV Opinion and Order* at ¶ 223-228 (OCC Appx. 000109-112).

As the Commission recognized in its decision below, the Renewable Generation Rider is an offshoot of the PPA Rider. *Id.* at ¶ 226. (OCC Appx. 000111.) The Commission previously approved the PPA Rider in the *PPA Rider Case* to, among other things, recover the costs of new renewable energy that AEP Ohio agreed in the settlement of that case to propose in the future. *Id.* This Court unanimously affirmed the Commission's decision in the *PPA Rider Case* last November. *See In re Application of Ohio Power Co.*, 2018-Ohio-4698. In the case below, the Commission approved the settling parties' proposal to establish the Renewable Generation Rider pursuant to R.C. 4928.143(B)(2)(c) for transparency and "in order to track the costs associated

with the renewable energy projects separate and apart from the costs and credits associated with the OVEC asset that flow through the PPA Rider." *ESP IV Opinion and Order* at ¶ 226. (OCC Appx. 000111.) The rate design and all other requirements applicable to the PPA Rider and approved in the *PPA Rider Case* remain identical and applicable to the Renewable Generation Rider. *Id.* at ¶ 50. (OCC Appx. 000027.)

The Commission expressly confirmed that the Renewable Generation Rider would be activated only by a "subsequent Commission order authorizing specific project(s)," in future EL-RDR cases to implement the Renewable Generation Rider, and that any costs included in the rider would be subject to annual prudence audits. *Id.* at ¶ 50-51. (OCC Appx. 000027-28.) It further recognized that AEP Ohio will demonstrate that the criteria in R.C. 4928.143(B)(2)(c), including the resource planning "need" showing, are met in the Company's future EL-RDR filings under the Renewable Generation Rider to seek approval for specific renewable projects, and that all parties reserved their right to contest the separate applications for approval of individual projects. *Id.* at ¶ 51. (OCC Appx. 000028.)

On appeal, OCC claims that the Commission erred in approving the placeholder Renewable Generation Rider under R.C. 4928.143(B)(2)(c) because the Commission did not make a need determination for a specific facility *in the ESP IV case* before authorizing the placeholder rider. (OCC Br. at 13-15.)[3] To put it differently, OCC's position is that the ESP proceeding must be "the proceeding" where need must be established under division (B)(2)(c) of the statute. (*Id.*) OCC's construction of the statute is illogical and incorrect. Division (B)(2)(c)'s reference to "the

[3] Throughout its brief, OCC incorrectly characterizes the Commission's approval of the Renewable Generation Rider as approving a "generation charge" under (B)(2)(c). (*See, e.g.,* at 14.) As set forth above, however, and as is clear from the Commission's decisions, *no charge* for the Renewable Generation Rider was established in the case below.

proceeding" is not – and cannot be – to a generic ESP proceeding in which a placeholder rider like the Renewable Generation Rider is established. Rather, it is to the proceeding where a nonbypassable surcharge is approved for the life of a specific facility under the statute – here, the EL-RDR proceeding(s) to implement AEP Ohio's Renewable Generation Rider.

The Commission correctly interpreted the statute to condition the approval of a nonbypassable surcharge to be recovered through the Renewable Generation Rider upon a future finding of resource planning need for a renewable generation facility, consistent with past Commission precedent. Opinion and Order at ¶ 227 (citing *ESP II Case*, Opinion and Order at 24 (Aug. 8, 2012); *In re Ohio Power Co.*, Case No. 10-501-EL-FOR, Opinion and Order at 23 (Jan. 9, 2013), Entry on Rehearing at 3-4 (Mar. 6, 2013)) (OCC Appx. 000111-112). The Commission thus correctly reaffirmed that the statute does "not restrict the determination of need to the time at which an ESP is approved. *Id.* The Commission's interpretation is practical, logical and consistent with its discretion in managing its own dockets. *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982); *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978). *See also* R.C. 4901.13. This Court should give deference to the Commission's reasonable interpretation of its statute and affirm the Commission's approval of the Renewable Generation Rider. *In re. Application of Columbus Southern Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 38.

CONCLUSION

For the foregoing reasons, the Court should reject the Propositions of Law advanced by OCC and affirm the Commission's decision.

Respectfully submitted,

/s/ Steven T. Nourse
Steven T. Nourse (0046705)
(Counsel of Record)
Christen M. Blend (0086881)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
cmblend@aep.com

Kathleen M. Trafford (0021753)
(Initial appearance)
L. Bradfield Hughes (0070997)
(Initial appearance)
Eric B. Gallon (0071465)
(Initial appearance)
Porter Wright Morris & Arthur, LLP
41 South High Street, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 227-1915
Facsimile: (614) 227-2100
ktrafford@porterwright.com
bhughes@porterwright.com
egallon@porterwright.com

Attorneys for Appellee
Ohio Power Company

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan.	:	Case No. 2018-1396 On Appeal from the Public Utilities Commission of Ohio, Case Nos.:
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	:	16-1852-EL-SSO and 16-1853-EL-AAM

APPENDIX TO MERIT BRIEF OF APPELLEE OHIO POWER COMPANY

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R.C. 4901.13 Publication of rules governing proceedings.

The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. All hearings shall be open to the public.

Effective Date: 10-01-1953.

R.C. 4905.13 System of accounts for public utilities.

The public utilities commission may establish a system of accounts to be kept by public utilities or railroads, including municipally owned or operated public utilities, or may classify said public utilities or railroads and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. Such system shall, when practicable, conform to the system prescribed by the department of taxation. The commission may prescribe the forms of accounts, records, and memorandums to be kept by such public utilities or railroads, including the accounts, records, and memorandums of the movement of traffic as well as of the receipts and expenditure of moneys, and any other forms, records, and memorandums which are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code. The system of accounts established by the commission and the forms of accounts, records, and memorandums prescribed by it shall not be inconsistent, in the case of corporations subject to the act of congress entitled "An act to regulate commerce" approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, with the systems and forms established for such corporations by the interstate commerce commission. This section does not affect the power of the public utilities commission to prescribe forms of accounts, records, and memorandums covering information in addition to that required by the interstate commerce commission. The public utilities commission may, after hearing had upon its own motion or complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Where the public utilities commission has prescribed the forms of accounts, records, or memorandums to be kept by any public utility or railroad for any of its business, no such public utility or railroad shall keep any accounts, records, or memorandums for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, except such accounts, records, or memorandums as are explanatory of and supplemental to the accounts, records, or memorandums prescribed by the commission. The commission shall at all times have access to all accounts kept by such public utilities or railroads and may designate any of its officers or employees to inspect and examine any such accounts. The auditor or other chief accounting officer of any such public utility or railroad shall keep such accounts and make the reports provided for in sections 4905.14 and 4907.13 of the Revised Code. Any auditor or chief accounting officer who fails to comply with this section shall be subject to the penalty provided for in division (B) of section 4905.99 of the Revised Code. The attorney general shall enforce such section upon request of the public utilities commission by mandamus or other appropriate proceedings.

Effective Date: 07-01-1996.

R.C. 4909.15 Fixation of reasonable rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or

municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)

(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas, water-works, or sewage disposal system company, not later than the end of the test period.

(D) A natural gas, water-works, or sewage disposal system company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas, water-works, or sewage disposal system company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

Amended by 129th General AssemblyFile No.199, HB 379, §1, eff. 3/27/2013.

Amended by 129th General AssemblyFile No.20, HB 95, §1, eff. 9/9/2011.

Effective Date: 11-24-1999 .

R.C. 4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

Effective Date: 2008 SB221 07-31-2008 .

R.C. 4928.142 Standard generation service offer price - competitive bidding.

(A) For the purpose of complying with section 4928.141 of the Revised Code and subject to division (D) of this section and, as applicable, subject to the rate plan requirement of division (A) of section 4928.141 of the Revised Code, an electric distribution utility may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.

(1) The market-rate offer shall be determined through a competitive bidding process that provides for all of the following:

(a) Open, fair, and transparent competitive solicitation;

(b) Clear product definition;

(c) Standardized bid evaluation criteria;

(d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met;

(e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. No generation supplier shall be prohibited from participating in the bidding process.

(2) The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect. An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

(1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.

(2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify

and monitor market conditions and mitigate conduct associated with the exercise of market power.

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

(C) Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

(1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five.

Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

(1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;

(2) Its prudently incurred purchased power costs;

(3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in

general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

(F) An electric distribution utility that has received commission approval of its first application under division (C) of this section shall not, nor ever shall be authorized or required by the commission to, file an application under section 4928.143 of the Revised Code.

Effective Date: 2008 SB221 07-31-2008; 2008 HB562 09-22-2008 .

Ohio Admin.Code §4901:1-10-08 Electric utility emergency plans and coordination for restoration of electric service.

(A) Each electric utility shall maintain an emergency plan(s) in accordance with this rule. Each emergency plan shall include at least the following elements, or if these elements are contained in another document, each electric utility shall reference such document in the plan:

(1) A table of contents, mission statement, and major objectives for the plan.

(2) A description of procedures the electric utility uses to move from its normal operations to each stage or level of outage response and restoration of services.

(3) A description of the electric utility's requirements for restoring service. In the event of an interruption of electric service during a period of emergency or disaster, an electric utility's service restoration plan shall give priority to hospitals that are customers of the electric utility.

(4) Identification and annual updates of all of the electric utility's critical facilities, as defined by the electric utility, and reasonable measures to protect its personnel and facilities.

(5) Contingency identification, i.e., a plan for training alternative or backup employees, identifying backup power supplies, and identifying alternative means of communicating with the office and field employees.

(6) A list of twenty-four hour phone numbers of fire and police departments and county/regional emergency management directors in its service area.

(7) Procedures for requesting aid, utilizing crews from other electric transmission owners and/or distribution utilities, and utilizing other restoration assistance.

(8) Procedures for prompt identification of outage areas; timely assessment of damage; and, as accurately as conditions allow, provision of an informed estimate of materials, equipment, personnel, and hours required to restore service.

(9) Performance objectives for telephone response time to customer outage calls and procedures to accomplish those objectives.

(10) The policy and procedures for outage response and restoration of service by priority and a list of such priorities, including the following:

(a) "Live wire down" situations.

(b) Restoring service to the facilities designated in paragraph (A)(3) of rule 4901:1-10-07 of the Administrative Code, and the entities specified in paragraph (A)(4) of rule 4901:1-10-07 of the Administrative Code.

(c) Providing information to critical customers who are without service.

(11) The policy and procedures for providing outage response and restoration of service updates to the county/regional emergency management directors, mayors, and other elected officials; the commission's outage coordinator; the commission's media office; the media; and the electric utility's customers.

(12) The policy and procedures to verify that service has been restored in each outage area.

(13) The policy and procedures for providing maximum outage response, seeking outside assistance, and restoring service in a worst case outage scenario, i.e., "a major event."

(14) The policy and procedures to provide supervisors who are responsible for emergency response a copy of the latest edition of the emergency plan.

(15) The policy and procedures to:

(a) Establish and maintain a liaison with appropriate fire and police departments within the electric utility's service territory.

(b) Identify major interruptions of service during which the electric utility will notify appropriate fire departments, police departments, and public officials regarding such interruptions.

(c) Determine appropriate mutual assistance and communication methodologies that will be used during major restoration efforts.

(16) In addition to any North American electric reliability corporation guidelines or standards, a continuity of operations plan to ensure continuance of minimum essential functions during events that cause staffing to be reduced. The continuity of operations plan shall, at a minimum, include:

(a) Plan activation triggers such as the world health organization's pandemic phase alert levels, widespread transmission within the United States, or a case at one or more locations within the state of Ohio.

(b) Identification of a pandemic coordinator and team with defined roles and responsibilities for preparedness and response planning.

(c) Identification of minimal essential functions, minimal staffing required to maintain such essential functions, and personnel resource pools required to ensure continuance of those functions in progressive stages associated with a declining workforce.

(d) Identification of essential employees and critical inputs (e.g., raw materials, equipment, suppliers, subcontractor services/products, and logistics) required to maintain business operations by location and function.

(e) Policies and procedures to address personal protection initiatives.

(f) Policies and procedures to maintain lines of communication with the commission during a declared emergency.

(17) Policies and procedures for conducting an after-action assessment following activation of the emergency plan. An after-action assessment shall be prepared and shall include lessons learned, deficiencies in the response to the emergency, deficiencies in the emergency plan, and actions to be taken to correct said deficiencies.

(B) Each electric utility shall make its emergency plan and amendments available for review by the commission's outage coordinator. In the emergency plan made available to the commission's outage coordinator, the electric utility may redact the following confidential information:

(1) The electric utility's internal phone numbers.

(2) The list of specific critical facilities.

(3) Names, home addresses, and home phone numbers of electric utility employees, other than employee information required for the annual emergency contact report pursuant to paragraph (G)(1)(a) of this rule.

(4) Security and personal information and numbers (e.g., lock combination, computer access codes, cipher locks, and security codes).

(5) Identification of the electric utility's radio and dispatch channels.

(6) Identification of the radio and dispatch channels and telephone numbers of the following:

(a) Fire department.

(b) Police department.

(c) Other emergency/safety organizations.

(d) Government and public officials.

(7) Similar information approved by the commission's outage coordinator.

(C) Each electric utility shall follow and implement the procedures in its emergency plan.

(D) Each electric utility shall review employee activities to determine whether its procedures in the emergency plan, as set forth in paragraph (B) of this rule, were effectively followed.

(E) Each electric utility shall establish and maintain policy and procedures to train its operating and emergency response personnel to assure they know and can implement emergency procedures, as set forth in paragraph (B) of this rule.

(F) Each electric utility shall establish procedures for analyzing failures of equipment and facilities which result in a major interruption of service, for the purpose of determining the causes of the failure and minimizing the possibility of a recurrence. If requested by a hospital that is its customer, an electric utility shall confer at least biennially with that hospital regarding power quality issues and concerns related to the utility's facilities, including voltage sags, spikes, and harmonic disturbances, in an effort to minimize those events or their impact on the hospital.

(G) At the direction of the commission's outage coordinator, each electric utility shall submit:

(1) An emergency contact report which shall contain all of the following information:

(a) The names, position titles, areas of functional responsibility, business addresses, e-mail addresses, business telephone numbers, cellular telephone numbers, and home telephone numbers of at least three individuals who will serve as emergency contacts.

(b) Any available emergency hotline number.

(c) The fax number(s) of its emergency contacts.

(2) A report confirming that the electric utility has reviewed its emergency plan and, if applicable, has revised and/or updated the plan, or has established a new plan.

Each electric utility shall also submit all revisions and updates to its plan or the new plan.

(3) Either of the following:

(a) If the electric utility has not implemented its emergency plan within the past year, a written statement attesting to that fact.

(b) If the electric utility has implemented part or all of its emergency plan within the past year, a written summary of both of the following:

(i) Any failures of equipment or facilities that were not the result of a major event and that resulted in a major interruption of service and the electric utility implementing its emergency plan.

(ii) The electric utility's efforts to minimize the possibility of a recurrence of such failures.

(H) Each electric utility shall promptly notify the commission's outage coordinator of any change in its emergency contacts.

(I) Each electric utility shall:

(1) Maintain and annually verify and update its list of critical customers.

(2) Provide critical customers, within ten business days after acceptance of their application, with a written statement of their options and responsibilities during outages, i.e., the need for backup generators, an alternative power source, or evacuation to another location.

(3) Annually notify customers of its critical customer program by bill insert or other notice.

(J) Every three years, each electric utility shall conduct a comprehensive emergency exercise to test and evaluate major components of its emergency plan and shall invite a cross-section of the following, or their representatives, to the exercise:

(1) Mayors and other elected officials.

(2) County/regional emergency management directors.

(3) Fire and police departments.

(4) Community organizations such as the American red cross.

(5) The commission's outage coordinator.

(K) When an electric utility has implemented its emergency plan as set forth in paragraph (A) of this rule in response to a major event, natural disaster, or outage, that electric utility may request that the commission waive the testing and evaluation of the emergency plan for the three-year period during which such implementation occurred. To request a waiver, the electric utility must submit a report to the commission's outage coordinator detailing:

(1) Its actions in implementing its emergency plan.

(2) What part of the emergency exercise the implemented plan replaces.

(3) Why the implementation is an appropriate replacement for an emergency exercise of all or a portion of the plan.

(4) The electric utility's interactions with the persons listed in paragraph (J) of this rule.

(5) Whether the implemented plan indicates that the electric utility's response to the emergency was sufficient. If the commission fails to act upon an electric utility's waiver request within sixty calendar days after such request is submitted to the outage coordinator, the waiver request shall be deemed to have been granted.

(L) Each electric utility shall coordinate the implementation of its emergency plan, to the extent that such electric utility would rely on or require information or assistance during an emergency, with the following:

(1) Any regional or state entities with authority, ownership, or control over electric transmission lines.

(2) Any generation provider connected to the electric utility's system.

(3) Any other electric utility or transmission owner with facilities connected to the electric utility.

(M) Each electric utility shall coordinate the implementation of its emergency plan with local, state, and regional emergency management organizations.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief and Appendix of Appellee Ohio Power Company was served via electronic mail upon the following parties of record, this 11th day of March, 2019.

William J. Michael william.michael@occ.ohio.gov
Terry L. Etter terry.etter@occ.ohio.gov

Counsel for Appellant The Ohio Consumers' Counsel

John H. Jones john.jones@ohioattorneygeneral.gov
Werner L. Margard III werner.margard@ohioattorneygeneral.gov
Robert A. Eubanks robert.eubanks@ohioattorneygeneral.gov

Counsel for Appellee The Public Utilities Commission of Ohio

/s/ Steven T. Nourse
Steven T. Nourse
Attorney for Appellee Ohio Power Company